No. 90-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AMERICAN MEDICAL ASSOCIATION,

Petitioner,

v.

CHESTER A. WILK, D.C.,
JAMES W. BRYDEN, D.C.,
PATRICIA B. ARTHUR, D.C. and
MICHAEL D. PEDIGO, D.C.,

Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents two questions relating to the ability of professions to promote the quality of their services through ethical guidelines having no effect on price and to conduct public information and legislative campaigns to combat dangerous and deceptive practices:

(1) Whether, contrary to the holdings of the Third, Fifth, and Ninth Circuits, an ethical guideline against the use of an unscientific or unsafe practice can be invalidated under the Sherman Act when the primary purpose of the guideline was found to be promoting the quality of service, when there has been no showing of an adverse effect on price or output in any market, and when the guideline was shown, at most, to have had only incidental and indirect effects on the individual competitors who practice the unscientific or unsafe method; and

(2) Whether, contrary to the *Noerr-Pennington* doctrine and numerous courts of appeals decisions, the First Amendment permits a court to rely on informational and legislative activities in finding both a past antitrust violation and a sufficient risk of recurrence to justify an injunction.

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The American Medical Association ("AMA")[1] respectfully submits this petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The District Court's initial *Wilk I* judgment for the AMA is unreported (Appendix ("App.") 191a). The Seventh Circuit's *Wilk I* opinion vacating this judgment (App. 144a-190a) is reported at 719 F.2d 207. The District Court's *Wilk II* opinion and judgment on remand (App. 53a-143a) is reported at 671 F. Supp. 1465. The Seventh Circuit's *Wilk II* opinion affirming that judgment (App. 1a-51a) is reported at 895 F.2d 353.

[1]Pursuant to Rule 29.1, the AMA states that it has no parent corporation and no subsidiaries that are not wholly-owned.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on February 7, 1990. The Court of Appeals denied the AMA's timely petition for rehearing on April 27, 1990. *See* App. 52a. On July 16, 1990, Justice Stevens extended the AMA's time for filing its petition for certiorari to and including August 25, 1990. On August 15, 1990, Justice Stevens granted a further extension to and including September 24, 1990. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment I:

> "Congress shall make no law . . . abridging freedom of speech . . . . "

Section One of the Sherman Act, 15 U.S.C. § 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

Section 16 of the Clayton Act, 15 U.S.C. § 26:

> "Any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . ."

STATEMENT OF THE CASE

Introduction

In this case, the Seventh Circuit has adopted an interpretation of the Sherman Act and the First Amendment that will prevent traditional activities of professions that are designed to enhance

the quality and reliability of their services, to promote public trust in them, and to prevent fraud and deception. The standard that the Seventh Circuit has adopted conflicts with the holdings of the Third, Fifth, and Ninth Circuits and with a number of prior decisions of this Court.

Specifically, the Seventh Circuit held that the AMA violated the Sherman Act between 1967 and 1980 because it (1) maintained a 125-year-old ethical guideline that physicians should use and promote only methods of healing having a scientific basis, and (2) made a series of public statements that one "method of healing" (chiropractic) is unscientific and dangerous. In so holding and in justifying an injunction, the Seventh Circuit further relied on the fact that the AMA had also conducted a public information campaign to "contain and ultimately eliminate" chiropractic through legislation.

The District Court found that the AMA's dominant motivation was to promote patient care and to enhance the quality and reliability of physicians' services. App. 86a. The District Court further found that chiropractic grew rapidly throughout the period of this "boycott" (App. 74a) and that the only effects of the AMA's conduct on chiropractors were that their costs were marginally higher and their incomes lower than they would have been if physicians had associated with chiropractors. App. 75a, 79a.

These findings would have foreclosed antitrust liability in the Third, Fifth, and Ninth Circuits. These courts hold that "concerted refusals to deal" that have no effect on price are not antitrust violations if their primary purpose is to promote product quality or safety, if they have not been shown to have adverse effects on overall output, and if they have only incidental effects on the individual competitors who are affected.[2] This is the rule

[2]*See, e.g.*, *Neeld* v. *National Hockey League*, 594 F.2d 1297, 1300 (9th Cir. 1979); *Hatley* v. *American Quarter Horse Association*, 552 F.2d 646, 652-54 (5th Cir. 1977); *Tripoli Co.* v. *Wella Co.*, 425 F.2d 932 (3d Cir. 1970); pp. 21-23, *infra*.

of reason analysis that this Court's decisions require in cases dealing with such facially reasonable non-price "restraints."

However, the Seventh Circuit here held that the rule of reason has to be "modified" in such cases. App. 175a. It held that antitrust liability can be imposed solely on the basis of (1) the District Court's finding that the AMA's conduct adversely affected "competition between medical doctors and chiropractors" by raising chiropractors' costs and reducing their incomes, and (2) the AMA's failure to meet the extraordinary burden of showing that the ethical guideline was the objectively reasonable alternative that was "least restrictive" of the businesses of the unscientific practitioners.

Unless reversed, this holding by the Seventh Circuit will severely inhibit, and likely prevent, professions from continuing their traditional activities that enhance the quality and reliability of physicians' services and prevent the long term erosion of public trust in the profession.

I. Chiropractic And The AMA's Ethical And Legislative Activities.

1. **Chiropractic**. Plaintiffs in this case are four individual chiropractors who each subscribe to the basic doctrine of chiropractic. That doctrine maintains that an innate force flowing through nerves in the body assures health and that diseases are caused by slight misalignments in the spinal column (known as "subluxations") that disrupt the flow of this vital "nerve energy." *See* Seventh Circuit Joint Appendix ("R") 107-08, 135, 229-30, 259-60.

Medical science has proven that these chiropractic "subluxations" cannot exist. DX 21049. However, chiropractors are taught that diseases can be prevented and cured by periodically manipulating the spine to alleviate "subluxations." DX 21048. For example, one of the plaintiffs testified in this case that

he tells his patients not to have their children vaccinated against smallpox and polio, but to rely on periodic spinal manipulations to ward off these diseases. R. 233.

2. **American Medical Association**. The AMA is a national association of physicians who practice in all medical specialties. Membership in the AMA is voluntary. Approximately 50% of the nation's 600,000 physicians are AMA members. Tr. 414-15.

The purpose of the AMA is to advance medical science and education. Since its founding in 1847, the AMA has sought to further this goal by, *inter alia*, (1) disseminating scientific information to physicians and exhorting them to provide and promote only those methods of healing based in science, and (2) seeking to expose and, in extreme cases to prohibit through legislation, the practices of faith healers, sectarian physicians, and other quacks that defraud and endanger patients.

Between 1963 and 1974, the AMA engaged in both courses of conduct with respect to chiropractic. It maintained its longstanding ethical guidelines against association with unscientific practitioners—which is the unlawful "restraint of trade" that the Seventh Circuit found. In addition, the AMA engaged in a separate legislative and informational campaign against chiropractic—which the Seventh Circuit relied upon in justifying an injunction.

3. **The AMA's Pre-*Goldfarb* Ethical Guidelines**. The AMA ethical guideline at issue is Principle 3 of the AMA *Principles of Medical Ethics*. This Principle provided that a physician "should practice a method of healing founded on a scientific basis" and "should not voluntarily associate with anyone who violates this principle." App. 3a n.1. This canon was indisputably not designed to determine what methods of healing are offered to the public. Because physicians do not control any essential facilities, they cannot prevent anyone from marketing health care services to the public. Only legislation can do that.

Indeed, the AMA guidelines expressly stated that patients may seek healing from whatever source they choose, be it "himself, his neighbor, chiropractic, naturopathy, or Christian Science." PX 505, p. 14. As the AMA made explicit long before chiropractic became a matter of special concern, the sole objective of Principle 3 was to enhance the quality and reliability of services that physicians themselves provide and to prevent the deception of patients that inherently results when physicians provide methods of healing that have no basis in science—or promote those unscientific methods through referral or other joint practice relationships with practitioners of them. *See* PX 504.

As the District Court found (App. 75a), these AMA ethical guidelines were never enforced against AMA members and were thus purely precatory. Indeed, they were disseminated in the hope that they would influence AMA members and non-members alike.

At all times relevant to this case, the AMA's ethical guidelines approved professional association with a number of providers of manipulative therapies who are not medical doctors, *e.g.*, physical therapists, osteopaths, and podiatrists. The AMA's ethical guidelines treated practitioners of chiropractic differently for one reason only: their "methods" had not ever been shown to have any scientific basis for treating any condition—as the District Court here found. *See* App. 84a-85a.

4. **The AMA's 1963-1974 Public Information And Legislative Campaign Against Chiropractic.** In the 1960s, the AMA became convinced that chiropractic had become such a unique threat to public health that the AMA also launched a public information campaign to "contain and ultimately eliminate" chiropractic in the only way possible—through legislation. Chiropractic had achieved some form of licensure in all but four states, and chiropractors were passing themselves off as "family doctors" who could use spinal manipulation to prevent, diagnose, treat, and

cure any condition—from polio, to tonsillitis, to heart disease, to diabetes, to high blood pressures, to the common cold. Virtually all chiropractors purported to treat these diseases.[3]

In 1963, the AMA formed a "Committee On Quackery" to investigate these matters, and in 1965, the AMA launched a public information and legislative campaign that was designed to "contain and ultimately to eliminate chiropractic."[4] Although the AMA also prepared pamphlets to warn consumers about chiropractic, the critical document in the legislative and public information campaign was a 1965 resolution of the AMA's House of Delegates. It declared that chiropractic is an "unscientific cult" whose members lack the education and training required to treat and diagnose diseases. DX 21208. It relied on the findings to this effect by then-District Judge J. Skelly Wright. *England* v. *Louisiana State Board of Medical Examiners*, 246 F. Supp. 993, 995 (E.D.La. 1965), *aff'd*, 384 U.S. 885 (1966).

The AMA was joined in this campaign by numerous economically disinterested groups. These included the Department of HEW, the AFL-CIO, the Consumer Federation of America, and *Consumer Reports* magazine. The AMA regarded this support as proof of the legitimacy of the AMA's effort and as refuting the chiropractic argument that the campaign was based solely in economics. *See* App. 17a; App. 81a; PX 464.

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[3]For example, a 1963 survey by the American Chiropractic Association reported that 93% of its members were treating high blood pressure, 89% were treating asthma, 70% were treating heart disease, 46% were treating diabetes, 67% were treating tonsillitis, 67% were treating dermatitis, and 47% were treating polio. DX 2003.

[4]The AMA set out to influence public opinion against chiropractic and to (1) dissuade patients from using these services by issuing pamphlets and other warnings, (2) lobby Congress against chiropractic's inclusion in Medicare, and (3) lobby against licensure in the four states that then prohibited chiropractors. If these initial efforts were successful, the AMA ultimately planned to seek the delicensing or legislative restriction of chiropractic in other states.

However, the AMA's legislative campaign failed. Chiropractic received limited coverage under Medicare and licensure in the remaining four states. The AMA ended the campaign in December of 1974.

5. **Post-1977 Ethical Changes**. Following this Court's 1975 decision in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), the AMA ceased circulating its existing ethical opinions. Shortly thereafter, this case and three other chiropractic antitrust suits were brought against the AMA, including a class action in Pennsylvania, and a suit by the Attorney General of New York.

Over the next few years, the AMA took a series of steps that reversed its ethical ban against association with chiropractors. In 1977, the AMA issued new opinions that physicians may ethically associate professionally with "licensed limited practitioners," which is a category that includes chiropractors. DX 21231. In 1979, the AMA's House of Delegates adopted a new statement on chiropractic that qualified its earlier criticisms of chiropractic and made it explicit that physicians can ethically associate with any "licensed limited practitioner" when the physician believes that this will be in a patient's best interests. PX 7248. In 1980, the AMA adopted new principles of medical ethics that eliminated Principle 3. DX 21233.

The AMA made these changes both (1) to reduce its antitrust exposure after *Goldfarb*, and (2) to reflect the emergence of a small group of "reform" chiropractors that had renounced the traditional tenets of chiropractic and confined themselves to accepted physical therapy treatments.

In 1978 and 1982, the AMA settled the Pennsylvania class action and the New York Attorney General's antitrust action respectively by "legally binding" itself to maintain the revised ethical guidelines that permit physicians to associate with a chiropractor if the physician believes this to be in a patient's best

interests. DX 21215; DX 21216. *See also* DX 21217 (settling Iowa case on same ground). While the AMA has eliminated the ethical guidelines that allegedly restrain trade, the AMA has not changed its views that practices of traditional chiropractors like the four plaintiffs are improper. The AMA further continues to express its views in response to consumer requests for information or in forums where the AMA's views are germane.

II. The First Trial And The Seventh Circuit's *Wilk I* Opinion.

Plaintiffs claimed in the District Court that the AMA's anti-chiropractic ethical guidelines and other activities between 1967 and 1976 violated Section One of the Sherman Act and that they had been injured because they allegedly would have "gained economically" if they had had professional relationships with physicians. App. 159a.[5] Because their complaint initially sought treble damages, these claims were the subject of an eight-week jury trial in 1980 and 1981.

The District Court's Jury Instructions In *Wilk I*. The case was submitted to the jury under rule of reason instructions that provided that the jury was to determine whether the purpose and overall effect of the AMA's ethical guidelines operated to promote or to restrain competition.

Specifically, the District Court instructed the jury that "[o]ne of the factors" it should consider was the effect of the AMA's practices "on competition, if any, that exists between chiroprac-

[5]Plaintiffs claimed that the absence of these relationships increased their costs: *e.g.*, by preventing chiropractors from using services of radiologists in those cases where chiropractors did not own their own x-ray machines. Although physicians concededly control no essential facilities, plaintiffs claimed that the lack of a physician's "stamp of approval" adversely affected their reputations and incomes. For these same reasons, plaintiffs argued that they had been severely harmed by the AMA's many derogatory statements about chiropractic.

tors generally and medical doctors." App. 168a. The District Court further instructed the jury that it should also consider the way in which ethical guidelines "affect the conduct of one profession, such as medical doctors." App. 169a. The District Court's instructions stated that ethical canons can promote competition among physicians and "benefit the public by raising professional standards generally, and by helping to insure that the profession merits the trust that the public necessarily places in its members." App. 169a.

The District Court thus instructed the jury to "consider the genuineness of the justification advanced in support of the standard, the reasonableness of the standard itself, the manner of its enforcement, and [its] effects." App. 169a. The District Court stated that the fact that one profession's guidelines have an "indirect effect on the activities of another profession, such as chiropractors" does not make it an unreasonable restraint of trade. App. 169a. The jury rendered a verdict for the AMA, and judgment was entered in the AMA's favor. App. 191a.

The Seventh Circuit's Opinion In *Wilk I*. The Seventh Circuit reversed the judgment for the AMA and remanded for a new trial, principally on the ground that the District Court's rule of reason instructions were erroneous.[6]

Specifically, the Seventh Circuit held that the sole inquiry under the rule of reason should have been on the impact of the challenged practices on competition *between chiropractors and physicians* and that "raising professional standards generally and . . . helping to insure that the profession merits the trust that the public necessarily places in its members" are "values unrelated to free competition." App. 172a.

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[6]The Seventh Circuit also held that the District Court committed reversible error in admitting certain evidence that was "relevant to the genuineness of the [AMA's] belief that chiropractic is quackery" (App. 186a) but that could, in the Seventh Circuit's view, be "addressed with a less extravagant volume of evidence, and with far less emphasis upon alleged financial greed." App. 187a.

At the same time, the Seventh Circuit held that the rule of reason should be "modif[ied]" in cases involving professional ethical guidelines to permit limited consideration of these other values. App. 175a. Specifically, it required a two-part inquiry in which (1) plaintiffs make out a prima facie case by showing that the ethical guidelines impaired "competition between medical doctors and chiropractors," and (2) the burden then shifts to the defendant to show that its guidelines are necessary to promote "patient care" and that there is no way of achieving this goal that would be "less restrictive" of "competition" by chiropractors. App. 174a, 177a-178a.

Under this "modified" rule of reason, the burden is placed on defendants to establish the following four elements of a "patient care" defense (App. 177a-178a):

> (1) that they genuinely entertained a concern for what they perceive as scientific method in the care of each person with whom they have entered into a doctor-patient relationship; (2) that this concern is objectively reasonable; (3) that this concern has been the dominant motivating factor in defendants' promulgation of Principle 3 and in the conduct intended to implement it; and (4) that this concern for scientific method in patient care could not have been adequately satisfied in a manner less restrictive of competition.

Because the Seventh Circuit's judgment also rested on evidentiary grounds (*see* p. 10 n.6, *supra*), the AMA did not then seek review of the Seventh Circuit's interpretation of the Sherman Act by filing a petition for certiorari from this interlocutory decision.[7]

III. The Second Trial And The Seventh Circuit's *Wilk II* Opinion.

On the eve of the 1987 retrial, plaintiffs abandoned their damages claims. They were permitted to try claims for injunctive

[7]After plaintiffs filed a petition for certiorari, the AMA filed a conditional cross-petition that was denied when the plaintiffs' petition was denied. *Wilk* v. *AMA*, 467 U.S. 1210 (1984).

relief to a district judge, despite the intervening antitrust settlements that are binding on the AMA. *See* pp. 8-9, *supra.* Following a 26-day bench trial, the District Court found that the AMA and its members had engaged in an unlawful "boycott" of the chiropractic profession and that an injunction should be entered to prevent future harm to plaintiffs. App. 62a-98a.

The District Court's Opinion In *Wilk II.* The District Court found that the AMA's ethical guidelines and its implementing conduct constituted a "boycott" and an unreasonable restraint of trade. The District Court acknowledged that there was no evidence that the AMA's conduct had had any adverse effect on price or output in any relevant market and that, to the contrary, it was undisputed that "the number of chiropractic schools, the number of chiropractors, and the number of patient visits to chiropractors grew during the boycott." App. 74a. However, the District Court found an unreasonable restraint because the AMA's conduct had raised the chiropractors' costs and reduced their incomes and because the District Court held that this constituted "actual proof of adverse effects" on competition that eliminated the need for other evidence. App. 76a.

Second, the District Court found that the AMA had not satisfied its burden of justifying its conduct under the Seventh Circuit's "patient care" defense or otherwise. It dismissed the evidence that Principle 3 was designed to promote physicians' reputations for quality on the ground that it was not supported by consumer surveys. App. 77a.

As to the "patient care defense," the District Court found that the AMA had proven two of the elements: (1) that it was genuinely concerned about the use of scientific method in patient care, and (2) that this was the dominant motivation in its anti-chiropractic conduct. App. 81a, 86a. However, although the District Court could not find chiropractic to be scientific and stated that

it could not endorse it (App. 86a), the District Court found that the AMA had not established the other two elements of the "patient care defense."

First, whereas the "boycott" was found objectively reasonable at its inception, the District Court found the AMA had not borne its burden of proving that its "boycott of the *entire* chiropractic profession was objectively reasonable throughout the *entire period* of the boycott." App. 86a (emphasis added). The District Court referred to the evidence that changes in one small element in the chiropractic profession had led to ethical changes in 1977, but that the "boycott," in its view, did not end until the AMA eliminated Principle 3 in 1980. App. 72a-73a. Second, the District Court found that the AMA had not shown that a consumer information or other public relations campaign could not have achieved its objectives in a manner "less restrictive" of the interests of chiropractors. App. 86a.

In all these regards, while stating that it could not rely on constitutionally protected activities (App. 63a n.2), the District Court found that the anticompetitive character of the AMA's conduct was established by the intent of its legislative campaign to contain and ultimately to eliminate chiropractic. App. 74a. The District Court's Opinion referred to this intent eleven times. *E.g.*, App. 62a-66a.

Finally, the District Court entered an injunction, despite the existence of three prior antitrust settlement that required the AMA to maintain the post-*Goldfarb* ethical guidelines that were found to satisfy the antitrust laws. The District Court relied on the facts that the AMA had not retracted its prior anti-chiropractic statements, that the tone of its ethical revisions was "begrudging," and that the AMA had continued to send out "anti-chiropractic literature" in response to requests for information by consumers and to urge more restrictive positions before accrediting bodies than chiropractors preferred. App. 95a-97a.

The Seventh Circuit's Opinion In *Wilk II*. The Seventh Circuit affirmed. It concluded that it was irrelevant both that the plaintiffs had failed to prove any adverse effects on price or output in a market and that output of chiropractic services had dramatically increased during the so-called boycott. It held that an adverse effect on competition is established by the findings that the AMA's conduct had raised chiropractors' costs, reduced the demand for chiropractic services, and reduced chiropractors' incomes and that a majority of physicians are AMA members. App. 20a-23a.

The Seventh Circuit similarly affirmed the District Court's findings that the AMA had not borne its burden of justifying these "anticompetitive effects" under the "patient care defense" or otherwise. It held that it was not sufficient that the AMA's ethical guidelines had no effect on price and were in fact motivated by a desire to improve the quality of physicians' services to benefit patients. The Seventh Circuit ruled that the evidence that health care consumers cannot evaluate the quality of health care services, and that they rely on physicians' reputations, was properly rejected because no consumer "study or data" was submitted to support this "speculative" theory. App. 15a. The Seventh Circuit further stated that because courts could not assess the scientific judgments underlying medical ethical guidelines, it could not approve them on this basis. App. 22a.

Like the District Court, the Seventh Circuit repeatedly relied on AMA conduct and documents that related only to its campaign to "contain and eliminate" chiropractic through legislation. *See* App. 19a. In particular, despite its holding that the District Court had misallocated the burden of proof by erroneously requiring defendants to prove that an injunction was not needed (App. 25a), the Seventh Circuit upheld the District Court's issuance of an injunction. The Seventh Circuit concluded that the District Court permissibly found that the "evidence" that the prior settlements "militat[ed] against the likelihood of recur-

rence" was "outweighed by [the] other evidence" that the AMA had not retracted its anti-chiropractic statements or repaired the damage to "chiropractors' reputations," but had continued to send out anti-chiropractic literature and had, in 1983, urged a more restrictive position before an accrediting body than had chiropractors. App. 27a-28a. These are activities that the AMA is free to engage in under the injunction. App. 136a.

REASONS FOR GRANTING THE WRIT

This case presents vitally important issues under the Sherman Act and the First Amendment. Any professional ethical guideline, trade association rule, privately-adopted standard, or statement by such a body can be characterized as a "boycott." Whether it is an "agreement by screw manufacturers to standardize sizes" or an ethical guideline designed to prevent deception, each can be treated as a concerted "refus[al] to deal except upon stated terms" to the extent it affects primary conduct. R. Bork, *Antitrust Paradox*, p. 333 (1978).

But whatever label is used, such action often promotes efficiency and can be "essential to the effectiveness of many wholly beneficial economic activities." *Id.* at 332; L. Sullivan, *Antitrust*, pp. 275-82 (1976). As this Court has recognized, that is especially the case with purely precatory professional ethical guidelines that are in no way directed at the pricing of services but are designed to promote the quality, reliability, and safety of professional services and to prevent deception or fraud. *See* p. 17, *infra*.

However, the Seventh Circuit's interpretation of the Sherman Act will severely inhibit the issuance of such professional ethical guidelines as well as any similar non-price "restraints" by trade associations, standard setting organizations, and others. Specifically, the Seventh Circuit rejected the rule in which a non-price restraint is valid if its primary purpose was to promote product safety and quality, if it had no adverse effect on price or output in any market, and if it had only incidental effects on the busi-

nesses of some individual competitors. Instead, the Seventh Circuit held that these incidental effects on individual competitors establish an antitrust violation unless the defendant bears an extraordinary burden of proof.

Further, in finding an antitrust violation and justifying an injunction, the Seventh Circuit has held that it is proper to consider pure speech: the dissemination of truthful information that did not constitute an ethical or other "restraint" on the conduct of physicians, but was designed to influence public opinion and to obtain legislation to contain and eliminate an unsafe or unscientific practice.

These holdings conflict with the prior decisions of this Court and of the Third, Fifth, and Ninth Circuits under both Section One of the Sherman Act and the First Amendment. Because the Seventh Circuit's holding deprives valuable, century-old professional activities of the "breathing room" that is essential to their continuation, the resolution of these conflicts in this case is a matter of paramount national importance.

I. The Seventh Circuit's Interpretation Of Section One Of The Sherman Act Conflicts With Prior Decisions Of This Court And Other Courts Of Appeals.

The Seventh Circuit held that the AMA's use of ethical standards to elevate the standards of physicians and to promote public trust in physicians' services involves "value[s] unrelated to free competition." App. 172a. It further held that the indirect effects of these guidelines on individual "competitors" violate the antitrust laws unless the AMA meets an extraordinary burden of proof.

However, the decisions of this Court and of at least three courts of appeals uniformly recognize that professional ethical guidelines like Principle 3 are classic examples of facially reasonable,

"nonprice" restraints. These cannot be held to violate the antitrust laws unless the plaintiff shows that the defendant's primary purpose was predatory or that the guidelines nonetheless reduced output or increased price in the market as a whole.

1. This Court has squarely rejected the Seventh Circuit's holding that efforts to promote quality of professional services and prevent deception are "value[s] unrelated to free competition." App. 172a. The Court has stated that professional "[e]thical norms may serve to regulate and promote competition" and that "[*c*]*ertainly,* the problem of professional deception is a proper subject of an ethical canon." *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 696 (1978) (emphasis added). It has recognized that "[t]he community is concerned with the maintenance of professional standards which will insure . . . protection against . . . alluring promises of physical relief" that have no scientific basis. *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 612 (1935).[8]

Ethical guidelines are subject to the same antitrust analysis, and same presumptions, that apply to all forms of concerted action. *See* P. Areeda, *Antitrust Law*, Vol. VII, ¶¶ 1500-1511 (1986). If a guideline involves a "naked restraint" on price and output, little analysis is required to condemn it, and the defendant has a substantial burden of justification. *See Professional Engi-*

[8]The Court has recognized that consumers lack the information required to assess professional services (*Dent* v. *West Virginia*, 129 U.S. 114, 122-23 (1889)), and that ethical guidelines can merely reflect the "consensus" of a profession on scientific questions involving the lack of efficacy of treatments (*e.g.*, Laetrile) or deceptiveness of particular practices. *Semler*, 294 U.S. at 612.

This Court has thus taken judicial notice of these common sense propositions—as is proper in antitrust cases. *See* P. Areeda, *Antitrust Law*, Vol. VII, § 1507C (1986). Here, by contrast, the AMA introduced abundant evidence of the "informational asymmetry" that this Court has recognized in professional service markets, but the Seventh Circuit required the use of consumer studies to prove them. App. 15a.

neers (ethical rule against competitive bidding); *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447 (1986) (ethical rule against providing information relevant to reasonableness of price); *NCAA* v. *Board of Regents*, 468 U.S. 85 (1984) (agreement to restrict price and output); *see also Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975).

Conversely, plaintiffs have a significant burden if the guideline "facially appears" to promote quality, safety, or efficiency, to have no restrictive effect on price or output, and to have only incidental effects on any adversely affected parties. *See Broadcast Music* v. *CBS*, 441 U.S. 1, 19-20 (1979); *see also Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing, Inc.*, 472 U.S. 284 (1985); P. Areeda, *Antitrust Law*, Vol. VII, ¶¶ 1507-08. In that event, the restriction is valid unless the plaintiff shows either (1) that the guideline is a "pretext"[9] and a "disguised naked restraint" because it was "aimed" not at creating efficiency, but at "destroying or coercing rivals by means that do not benefit consumers,"[10] or (2) that the guideline in fact operated to restrict output in the market as a whole, with the court to assess both the beneficial effects on "intrabrand" competition (among physicians)

[9]*Northwest Wholesale Stationers*, 472 U.S. at 296 n.7.

[10]R. Bork, *Antitrust Paradox*, p. 334; *see Hydrolevel Corp. v. American Society of Mechanical Engineers*, 635 F.2d 118 (2d Cir. 1980), *aff'd*, 456 U.S. 556 (1982); *Indian Head, Inc.* v. *Allied Tube & Conduit Corp.*, 817 F.2d 938 (2d Cir. 1987), *aff'd*, 486 U.S. 492 (1988)).

Indeed, where, as here, ethical guidelines facially rest on scientific judgment, this inquiry into the genuineness of the scientific judgment should represent the full extent of the judicial role. As the Seventh Circuit correctly recognized, courts cannot determine the questions of science underlying ethical guidelines. *See* App. 22a. This realization should have led the Seventh Circuit to limit the judicial examination to the *bona fides* of the underlying scientific judgment, whether it was in fact primarily based on concerns about quality, or whether the guideline was discriminatory. The Seventh Circuit, instead, launched an incursion into the "objective reasonableness" of *bona fide* scientific judgments and whether they are the "alternative" that is "least restrictive" of businesses of unscientific practitioners. App. 19a.

as well as any adverse effects on "interbrand" competition (between chiropractors and physicians).[11]

Contrary to the Seventh Circuit's decision, this Court's holdings establish that a restraint that has no unreasonable effect on competition is valid, whether or not it is the alternative that is "least restrictive" of the interests of the unscientific individual competitors.[12] It is the plaintiffs' burden to show unreasonableness.

The District Court instructed the jury under these standards in the first trial of this case, and it produced a jury verdict and initial judgment for the AMA. This analysis similarly requires the entry of judgment for the AMA now under the findings that the District Court made in the 1987 retrial.

The AMA's ethical guidelines were classic examples of "facially reasonable" and "non-price" restraints. On their face, the guidelines operated to assure the quality and reliability of the services that physicians either provide themselves or promote through referral or other joint practice relationships with non-physicians. All the guidelines did was exhort that these services be limited to methods of healing based on science (e.g., the manipulative therapies of physical therapists) and exclude methods that are unproven, worthless, or dangerous (e.g., claims that

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[11]*Continental T.V., Inc.* v. *GTE Sylvania*, 433 U.S. 36 (1977); *see NCAA* v. *Board of Regents*, 468 U.S. at 115 & n.55; *Northwestern Wholesale Stationers, Inc.*, 472 U.S. at 297-98.

[12]*Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. at 58 n.29 (challenged conduct can satisfy the antitrust laws even though that conduct "was neither the least nor the most restrictive provision" available). *See Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918). *See also* P. Areeda, Vol. VII *Antitrust Law*, § 1505 & 1511.

Indeed, the invocation of the concept of "least restrictive" alternatives is otherwise ironic and improper. The concept was developed to assure adequate protection of First Amendment rights. Yet here the concept is being applied to inhibit socially valuable speech.

chiropractic cures disease). This further avoids the deception of patients that would result if physicians promoted treatments having no basis in science. The guideline was no different in principle than an agreement by manufacturers of screws to standardize sizes. *See* R. Bork, *Antitrust Paradox*, p. 333; L. Sullivan, *Antitrust*, pp. 175-82 (1976).

Further, as the Seventh Circuit acknowledged (App. 166a), the guidelines did not affect the relationships that chiropractors independently establish either with their patients or with suppliers of "inputs" that chiropractors need (*e.g.*, x-ray machines), for physicians who complied with the guidelines imposed no economic coercion on third parties who deal with chiropractors. *Compare* App. 166a, *with Fashion Originators Guild of America* v. *FTC*, 312 U.S. 457 (1941). The AMA guidelines merely define the scientific services that physicians themselves offer or promote. Moreover, because physicians do not control any essential facilities and have no ability to prevent chiropractors from independently marketing their services to patients, chiropractic could, and did, grow during the period of the so-called "boycott"—as the District Court found. App. 74a. Any adverse effects on chiropractors were purely incidental.[13]

Against this background, antitrust liability should have been foreclosed (1) by the District Court's findings that the predominant purpose of the guidelines was to improve the quality of care that physicians provide patients and benefit consumers, and (2) by plaintiffs' failure to show, or even attempt to show, that the guidelines in fact operated to increase price or reduce overall output in any relevant health care market: *i.e.*, the aggregate output of physicians, the physical therapists and other non-phy-

[13]Further, even these consequences were mitigated by the facts that the guidelines were never enforced against AMA members who associated with chiropractors and that, further, no physician needs to be an AMA member.

sicians to whom physicians referred patients under the former guidelines, as well as chiropractors.

Finally, this Court's decisions squarely foreclose the Seventh Circuit's holding that the unquantified increase in chiropractors' costs and reductions in their incomes constitute "adverse effects on *competition*." App. 12a (emphasis added). Rather, these epitomize the indirect and incidental effects on individual competitors that are inherent in any ancillary restraint. *See, e.g., Northwest Wholesale Stationers, Inc.*, 472 U.S. at 297. Because this Court has repeatedly held that the antitrust laws protect competition, not individual competitors (*see, e.g., Cargill, Inc.* v. *Monfort*, 479 U.S. 104, 110 (1986)), these indirect effects cannot establish an antitrust violation.

2. The Seventh Circuit's interpretation also squarely conflicts with the holdings of the Third, Fifth, and Ninth Circuits. Each holds that concerted refusals to deal are lawful when, as here, their primary purpose is to promote safety and product quality, and when, as here, any adverse effects on individual competitors are indirect and incidental to these purposes.

The Ninth Circuit has so held in several cases. For example, in *Neeld* v. *National Hockey League*, 594 F.2d 1297 (9th Cir. 1979), the Ninth Circuit upheld a by-law of the National Hockey League that excluded hockey players who have sight in only one eye. This rule adversely affected both the ability of "one-eyed players" to compete and their incomes. Yet the Court upheld the by-law because its "primary purpose" was found to be safety and because any "anticompetitive effect" was minimal and "incidental to the primary purpose of promoting safety." 594 F.2d at 1300. *Accord Deesen* v. *Professional Golfers' Association*, 358 F.2d 165, 170-71 (9th Cir. 1966); *see Neeld*, 594 F.2d at 1298-99 n.3 (collecting other such Ninth Circuit holdings). Thus, the Ninth Circuit has held that a professional ethical rule is valid if it "contribute[s]

directly to improving service to the public," even if it has incidental adverse effects on some individual competitors. *Boddicker* v. *Arizona State Dental Association*, 549 F.2d 626, 632 (9th Cir. 1977).

Similarly, the Fifth Circuit has rejected the Seventh Circuit's approach in a series of decisions that hold that ethical guidelines that do not affect price and are designed to improve the quality of services are not violations of the Sherman Act. For example, *Hatley* v. *American Quarter Horse Association*, 552 F.2d 646 (5th Cir. 1977) rejected a claim that it was an unlawful "boycott" for defendants to exclude a quarter horse from racing because the horse had white markings beyond specified areas of its body. Despite the fact that the concerted refusal to deal had severely harmed the horse's owner, the court held the conduct was valid under the Sherman Act because defendants "sought to protect the industry and the general interest in improvement of the quarter horse breed" (*id.* at 653) and because their standards were not applied "in a discriminatory, arbitrary, or capricious fashion." *Id.* at 653-54.

Indeed, other Fifth Circuit decisions direct the very competitive inquiry that the District Court instructed the jury to follow in the first trial of this case, but that the Seventh Circuit held improper. In *Feminist Women's Health Center* v. *Mohammad*, 586 F.2d 530 (1978), the Fifth Circuit remanded a challenge to conduct implementing ethical standards for a determination of "the genuineness of the defendants' justification, the reasonableness of the standards themselves, and the manner of their enforcement." *Id.* at 547; *accord* App. 169a (quoting District Court's jury instructions).

Similarly, the Third Circuit has held that marketing restraints designed to promote product safety are valid. *See Tripoli Co.* v. *Wella Corp.*, 425 F.2d 932 (3rd Cir. 1970) (en banc). The Court

cited this Third Circuit decision with approval in *Professional Engineers*, 435 U.S. at 696 n.22.[14]

Finally, other courts of appeals reject the Seventh Circuit's holding that a reasonable restraint is invalid unless it is the least restrictive alternative[15] and that the burden of proof can be shifted to defendant on any issue relevant to the antitrust calculus.[16] *See also* P. Areeda, Vol. VII, *Antitrust Law*, ¶¶ 1505 & 1511, p. 429 (burden is on plaintiff to prove the restraint is not "reasonably necessary" to advance a legitimate purpose and there is no requirement that the means be the "least restrictive" of the plaintiffs' interests).

3. The conflicts should be resolved in this case. Activities that are vitally "important in a profession's proper ordering" will be severely inhibited, and likely prevented, unless and until the Sev-

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[14]These courts of appeals also squarely reject the Seventh Circuit's holding that the indirect and incidental effects on competitors' costs and incomes can constitute harm to competition. Indeed, because physicians control no essential facilities, the plaintiffs' claim of injury in this case was simply that they would look more attractive to patients, and make more money, if physicians promoted their services through referral relationships. However, as courts of appeals hold, "[a] plaintiff does not have a claim under the rule of reason simply because others refuse to promote [or] approve [his] products." *Consolidated Metal Products, Inc.* v. *American Petroleum Institute*, 846 F.2d 284, 293 (5th Cir. 1988); *accord Clamp-All Corp.* v. *Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 487 (1st Cir. 1988).

[15]*Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 229 n.11 (D.C. Cir. 1986) (Bork, J.) ("Once it is clear that restraints can only be intended to enhance efficiency rather than to restrict output, the degree of restraint is a matter of business rather than legal judgment"); *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1248-49 (3d Cir. 1975); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 303 (2d Cir. 1979).

[16]*Betaseed, Inc.* v. *U & I, Inc.*, 681 F.2d 1203, 1228 (9th Cir. 1982) (burden of proof is on plaintiff to prove unreasonable purpose or effects); *Graphic Products Distributors, Inc.* v. *Itek Corp.*, 717 F.2d 1560 (11th Cir. 1983) (same).

enth Circuit's decision is reversed. *See Professional Engineers*, 435 U.S. at 700 (Blackmun, J., concurring).

Professions have adopted codes of ethics since the time of Hippocrates. Throughout its 143-year history, the AMA, like other professional associations, has disseminated ethical guidelines and scientific information to physicians in order to exhort them to act as fiduciaries, to serve the best interests of patients, and to refrain from conduct that would erode the professionalism and public trust that is essential to the efficient functioning of the health care market. These efforts reflect the fact that ethical canons are the most efficient way of disseminating important information that represents the "consensus" of the profession on fundamental matters of medical science and practice (*Semler* v. *Board of Dental Examiners*, 294 U.S. at 612), and a deeply held belief that the canons will, at the margins, influence all physicians (AMA members and non-members alike) in ways benefitting consumers and the profession alike.

The Seventh Circuit's analysis imposes a severe and impractical burden on this process. Any ethical norm or statement that counsels against an unscientific method of treatment can raise the costs, or reduce the incomes, of the practitioners of the unscientific method. Under the Seventh Circuit's holding, this fact alone will result in antitrust liability unless the defendant can bear the burden of persuading a court that the unquantifiable (albeit deeply felt) tendencies of such guidelines to promote quality outweigh the adverse effects of unscientific practitioners and are the "alternative" that is "least restrictive" of their interests. These risks are compounded by the Seventh Circuit's holding that, even when, as here, the guideline was found to be "objectively reasonable" at its inception, liability may be imposed unless the defendant proves its validity anew for each subsequent year or day that the "boycott" is deemed to be in effect. *See* App. 19a; App. 84a.

The magnitude of the burden that this holding imposes is vividly demonstrated by the Seventh Circuit's insistence on studies and consumer surveys to establish the proposition that consumers rely on physicians' referral recommendations and by the related requirement that "consumer education" programs should be attempted before professions attempt to use ethical guidelines directly to influence the conduct of the physicians upon whom consumers rely. App. 15a, 19a. The Seventh Circuit has required professions to pursue every imaginable alternative before adopting the most efficient means of promoting quality and preventing deception—and then satisfy a court that its choice was the objectively reasonable alternative that was "least restrictive." This burdens the process of formulating ethical norms to the point of near impossibility.

That is especially so because the antitrust liabilities that the profession risks are massive. Here, plaintiffs' claim for attorneys' fees alone is based on a "lodestar" of $2.4 million, which they have inflated to a $14 million claim. Because the potential liabilities are so great, socially valuable and pro-competitive professional self-regulation simply will not occur unless it is afforded the "breathing room" that the doctrine of ancillary restraints provides and that the Seventh Court's holding denies.

II. The Seventh Circuit's Reliance On Constitutionally Protected Speech In Finding Liability And Entering An Injunction Is Contrary To This Court's *Noerr-Pennington* Doctrine And To The Decisions Of A Number Of Courts Of Appeals.

The beneficial professional activities that are at risk are not confined to promulgation of ethical codes. Here, in inferring the existence of a "conspiracy" between the AMA and its members and entering an injunction, the Seventh Circuit did not rely merely on the AMA's unenforced ethical guidelines. It also relied on activity that is pure speech and that has been repeatedly held

to promote competition: the publication (and non-retraction) of articles, pamphlets, and other statements that condemned chiropractic and were designed to influence public opinion and obtain legislation to contain and ultimately eliminate chiropractic.[17]

This is contrary to this Court's decisions in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and its numerous progeny. For example, last term, in *FTC* v. *Superior Trial Court Lawyers Association*, 110 S.Ct. 768 (1990), this Court held that whereas a boycott designed to fix prices can be invalidated, an "association's efforts to publicize the boycott, to explain the merits of its cause, and to lobby . . . to enact favorable legislation . . . were activities that were fully protected by the First Amendment" and cannot be "condemned." *Id.* at 777.

Thus, courts of appeals hold that when an association is engaged in both protected speech and constitutionally unprotected ethical activities, a court must carefully distinguish one from the other. *Federal Prescription Services, Inc.* v. *American Pharmaceutical Corp.*, 663 F.2d 253, 261-68 (D.C. Cir. 1981). Inferences of anticompetitive conduct may not be drawn from prior constitutionally protected activity. *Greenwood Utilities Commission* v. *Mississippi Power Co.*, 751 F.2d 1484, 1503 (5th Cir. 1985).

However, the Seventh Circuit did exactly that. It relied extensively on the AMA's separate public informational and legislative

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[17]*See, e.g., Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 493, 500-01 (1988); *Maple Flooring Manufacturers Ass'n* v. *United States*, 268 U.S. 563, 583 (1925). Indeed, "it is an article of national faith that on balance the free flow of truth and reasoned opinion *enhances* competition." *Safecard Services, Inc.* v. *Dow Jones & Co.*, 537 F. Supp. 1137, 1146 (E.D. Va. 1982) (emphasis in original), *aff'd mem.*, 705 F.2d 445 (4th Cir. 1983); *see also FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 603-04 (1967) (Harlan, J., concurring); *Consolidated Metal Products, Inc.* v. *American Petroleum Institute*, 846 F.2d 284, 296 (5th Cir. 1988).

campaign in condemning the AMA's ethical guidelines.[18] Most pertinently, the Seventh Circuit upheld an otherwise unjustifiable injunction on the basis of the AMA's dissemination of information that is constitutionally protected and pro-competitive.

Under Section 16 of the Clayton Act, injunctive relief may be entered only "against threatened loss or damage by a violation of the antitrust laws." A private plaintiff cannot obtain an injunction against discontinued conduct unless there is a "cognizable danger of recurrent violation"—*i.e.*, "something more than the mere possibility which serves to keep the case alive." *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *see also United States* v. *Oregon State Medical Society*, 343 U.S. 326 (1952) (denying antitrust injunction against abandoned activities).

Here, a single fact should have foreclosed such an injunction. The AMA previously entered into three chiropractic antitrust settlements that prohibit any recurrence of the only conduct that could be found to violate the antitrust laws—its pre-1977 ethical guidelines—and that require the AMA to maintain the "current" position that was found to satisfy the antitrust laws. Indeed, because the 1981 settlement with the New York Attorney General explicitly so provides, there was no need for the 1987 retrial, much less for an injunction. "[T]he fact is that one [such] injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 261 (1972).

However, while the Seventh Circuit held that the settlements are "evidence militating against the likelihood of recurrence," it

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[18]For example, the Seventh Circuit expressly held that it was proper for the District Court to infer anticompetitive consequences from the AMA's success in enlisting economically disinterested groups such as HEW, the AFL-CIO, the Consumer Federation of America, and *Consumers Reports* in its legislative campaign against chiropractic and to rely on this fact in answering chiropractors' charges that the legislative campaign was based in economics. *See* App. 8a; 81a.

held that the District Court could find that this evidence was "outweighed" by "other evidence." App. 28a. But this "other evidence" is all constitutionally protected speech. It consists of "evidence" that the AMA had expressed certain views before an accrediting body in 1983, that it had continued to send out "anti-chiropractic literature" in response to consumer requests for information, that it had not "retracted" prior derogatory articles and statements, that it did not otherwise repair the "lingering effects" of the damage to "chiropractors' reputations" and incomes, and that the tone of its ethical changes was "begrudging." App. 26a-32a; App. 87a-98a. Because each of these items epitomizes conduct that the First Amendment protects, it was impermissible for the District Court to base an injunction on them.

Here, too, this error has profound consequences for activities of professional associations that benefit the public. A major part of the activities of the AMA and other professional associations consists of disseminating scientific information to physicians, pamphlets to consumers, and information to legislative and other government officials. If an unjustifiable injunction—and an award of attorneys' fees—can be predicated on such activities and on the AMA's *truthful* statements about chiropractic, it will profoundly inhibit efforts to disseminate information to consumers and legislatures alike.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be granted.

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